[Cite as *In re A.V.*, 2014-Ohio-5348.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101391

IN RE: A.V.
A Minor Child

[Appeal By Mother]

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Juvenile Division
Case No. AD 12912599

BEFORE: Jones, P.J., Kilbane, J., and Blackmon, J.

RELEASED AND JOURNALIZED: December 4, 2014

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LARRY A. JONES, SR., P.J.:

{¶1} Appellant-mother, I.V. ("Mother"), appeals the trial court's decision granting permanent custody of her biological son, A.V., to the Cuyahoga County Department of Children and Family Services ("CCDCFS"). For the reasons that follow, we affirm.

I. Procedural History and Facts

{¶2} Mother gave birth to A.V. on June 28, 2012. Mother alleged that she was unaware she was pregnant until she went into labor and gave birth at a friend's house, with whom she was staying at the time. Mother and baby went to the hospital and Mother left the baby at the hospital.[1]

{¶3} Two days after A.V. was born, CCDCFS took emergency custody of him. A.V. was adjudicated to be a dependent child and was placed in the temporary custody of the agency. CCDCFS developed a case plan to facilitate the permanency goal of reunification. CCDCFS filed a motion to modify temporary custody to permanent custody on June 6, 2013, based on Mother's lack of progress on her caseplan. The court held hearings on the agency's motion on March 13 and April 8, 2014.

Agency's Case

{¶4} Cynthia Hurry testified that she was the ongoing social worker assigned to A.V.'s case. She had been employed by CCDCFS for 19 years and had worked on 15-20 permanent custody cases. Hurry testified that the initial referral came in to the agency because Mother did

[1]It is unclear from the record why Mother left A.V. at the hospital and there was no testimony given on this point. In one part of the record, Mother claimed she needed to find a place to stay and secure provisions for the baby. In another part, Mother claimed hospital staff told her that she, the Mother, could stay at the hospital for a few extra days (and Mother presumed the hospital would care for the baby after she checked herself out).

not have stable housing and had been moving around from place to place and did not have any provisions for the baby. Mother gave birth to the baby at the home of an elderly man where she had been staying, but paternity testing showed the man was not A.V.'s biological father.

{¶5} The agency developed a caseplan for Mother that included parenting education, housing, employment, mental health, and establishing paternity. The caseplan was later amended to include a supported visitation program to assist with mother–child bonding.

{¶6} Hurry testified that Mother was referred for mental health services "based on certain statements that she had made that were a cause of concern, different behaviors that she displayed * * * [w]e wanted to make sure that she had a full understanding and capacity to benefit from the services." Mother completed a psychological evaluation with Dr. Douglas Waltman, that identified behaviors and characteristics consistent with schizotypal personality disorder. Mother resisted the psychologist's recommendation that she undergo a psychiatric evaluation and decided to have the initial evaluation repeated by a doctor of her choosing.

{¶7} Mother saw Dr. Melvin Painter for a second psychological evaluation. According to Hurry, Dr. Painter, whose evaluation was not made a part of the trial court record, also recommended Mother have a further psychiatric evaluation. Dr. Painter did not make any diagnostic impressions.

{¶8} Based on Dr. Waltman's evaluation, the agency recommended Mother receive psychiatric and forensic psychological evaluations and show a willingness to receive long-term therapy and medication if necessary. Hurry testified that Mother initially sought her assistance in complying with this part of the caseplan, and Hurry referred Mother to MetroHealth Hospital. Mother refused services from MetroHealth, telling Hurry that they did not have psychiatric care at that facility, even though the hospital was a common place for the agency to refer clients.

Mother did not follow through with any further mental health services and was, therefore, noncompliant with this portion of her caseplan.

{¶9} Hurry testified that Mother moved in with Larry Drumm ("Drumm"), the father of Robert Drumm ("Robert"), within a few days after giving birth. Mother told Hurry that Robert was A.V.'s biological father and continued to insist Robert was the father even after paternity testing ruled him out as the baby's biological father.

{¶10} As part of her caseplan, the agency recommended Mother secure independent housing and gave her referrals to assist her with doing so. The agency did not consider Drumm's home appropriate for A.V. for many reasons. Drumm had significant health issues, some of which were alcohol-related. After Mother moved in with Drumm, his children moved out because they were unhappy Mother was living there, which left no one to care for Drumm's health needs. In September 2012, a week after the paternity testing showed that Robert was not A.V.'s biological father, Drumm served Mother with a 30-day notice to vacate the premises, but she never moved out. Other times, Drumm expressed to Hurry that he did not want a child living in the house.

{¶11} When Hurry visited Drumm's house for the first time, she detected a strong smell of urine and noted that there were multiple buckets in the basement of the house used for toileting. At the time of this visit, Hurry saw a crib, clothes, and diapers for the baby, as well as food, and noted that Mother had one of the larger bedrooms on the first floor of the house. She also saw that Mother had clothes for the baby up to size six. Hurry noted receipts that showed that Drumm paid for many of the items that were to be for the baby. On Hurry's second visit to the Drumm household, the house was cleaner and the odor of urine had decreased.

{¶12} Hurry acknowledged that Mother signed a lease with Drumm in 2013, but insisted that the scene in the house was "chaotic." Drumm's children called Hurry "constantly," asking for help to remove Mother from their father's home. Hurry testified that Drumm's children did not appreciate that he gave Mother their deceased mother's bedroom or that she "took" Drumm's money. According to Hurry, the lease terms did not require Mother to pay rent; instead, Mother lived in the house rent free in exchange for cooking and cleaning. Drumm also regularly gave Mother money, according to Hurry, "[s]ome in the form of cash and some in the form of checks, and * * * she's had access to his credit card as well."

{¶13} In late 2013, Drumm was hospitalized and was moved to a nursing home from late November 2013 until February 2014. This concerned the agency, because he was the sole owner of the house and "if he is unable to maintain the home, obviously Mother is without a place to live at all." At the agency's January 2014 semi-annual review meeting ("SAR"), CCDCFS noted that Drumm's children planned on selling his house and renting him an apartment, which would leave Mother homeless.

{¶14} To assist with the housing portion of her caseplan, Hurry referred Mother to Lakewood Community Collaborative ("Lakewood"), a housing assistance program. Mother refused a referral from Lakewood to a shelter where she could stay with A.V. Although the Lakewood program could have also assisted Mother with applications for government housing, utilities programs, and similar assistance, Mother refused any additional services.

{¶15} Mother refused to acquire independent housing and told Hurry that she planned on staying in the Drumm household with A.V. after she regained custody. As of the date of the permanent custody hearings, Mother was still living in Drumm's house.[2]

{¶16} Hurry testified that Mother's compliance with her case plan objective for housing was "insufficient" because Mother did not progress toward her goal for independent housing and declined assistance from the agency to find housing.

{¶17} As to the employment component of her caseplan, Hurry testified that Mother was currently unemployed and had been employed for only three months during the pendency of the case. Mother was employed at McDonald's for two months, but quit showing up for work, and worked for one month at Marc's discount store before she left that job too. The agency referred Mother for employment services but Mother had not been successful in finding employment, even though Mother told Hurry she had a teaching background and university experience. Mother expressed interest in becoming a nurse's aide so Hurry gave her information on training and programs to become certified in that field, but, according to Hurry, Mother did not participate with her service providers.

{¶18} In order to comply with caseplan requirements, Mother had to show that she applied for three jobs a week, but Mother failed to provide proof of this to the agency. Mother claimed she submitted numerous online job applications, but did not show any documentation to support this claim.

{¶19} Hurry testified that Mother did not have the means to support herself and A.V. or provide for the baby's basic needs. When asked how Mother supported herself, Hurry testified

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[2]At oral argument, attorneys for both Mother and CCDCFS stated they were unaware of Mother's current housing situation.

that Drumm gave her a large amount of money, which concerned the agency. Mother also told Hurry that she did not intend to work for the first two years of A.V.'s life and could subsist on government assistance. The agency determined that Mother's domestic services in exchange for rent did not amount to stable and gainful employment nor did living with Drumm satisfy the goal of having stable, independent housing.

{¶20} Hurry testified that another caseplan goal was also to establish paternity, partly because Mother did not have any relatives in the United States. The agency thought that even if Mother's relatives lived in another country, they still might provide financial and emotional support for her and A.V., but Mother refused to divulge any information about her relatives. Efforts were also made to connect Mother with the Romanian community in Cleveland, but Mother refused to have a Romanian parenting "coach" or mentor. Mother continued to insist that Robert Drumm was the child's father, even after he was ruled out by a paternity test. Mother told Hurry she did not believe the test results and refused to believe that anyone else could be the father. Because Mother was unable to establish paternity, the agency was not able to pursue placement with any paternal relatives.

{¶21} For the parenting portion of the caseplan, Hurry testified that Mother completed an agency-referred parenting course and then found her own parenting course that primarily focused on raising older children, instead of infants. Mother also claimed she had read numerous parenting books. Despite this training, Hurry testified that the agency was still concerned about Mother's lack of parenting skills. As an example, Hurry testified that Mother initially tried to overdress and overfeed A.V. during visits, to the point where the baby was sweating and crying and throwing up from the amount of food Mother was feeding him. Hurry acknowledged that Mother had made some progress with both of those concerns.

{¶22} Mother also participated in a supportive visitation program, but the visits with A.V. were always supervised and never progressed to more than two hours, one time per week. In the caseplan filed September 11, 2013, it was noted that Mother did not have unsupervised visits with A.V., in part, because the agency was concerned Mother might try to leave the country with him.

{¶23} Hurry testified that Mother brought toys, clothes, and food for A.V. to the visits, but not all items were age-appropriate and Mother did not always engage A.V. in an appropriate way. For example, Mother insisted A.V. learn how to hold a crayon properly and tried to use flashcards with him when he was too young to learn those skills. More concerning to Hurry was Mother bringing expired formula or food to visits for the foster mother to give to A.V. Hurry testified that even after sharing her concerns with Mother, it happened frequently and became a "big problem."

{¶24} A.V. also cried uncontrollably during visits with Mother, often through the entire visit and to the point of vomiting. Hurry testified that although the crying lessened over time, A.V. would still start to cry as soon as he saw Mother and showed a lot of anxiety around his visits with Mother. At one point, the agency increased the frequency of visits from twice a month to every week to try and facilitate bonding. The agency also brought in a "visits coach," but the more frequent visits caused A.V. "distress," which did not lessen until the visits were moved back to the every-other-week schedule.

{¶25} When asked to describe the mother–son bond, Hurry testified that there was no bond: "I would say that he has an awareness of it now. He will start crying as soon as he sees the building coming into the back parking lot. He recognizes he's about to see her [Mother],

but I don't know that he views her as a person of safety because he's still quite uncomfortable. He cries immediately upon hand off [to Mother]."

{¶26} Hurry testified that the agency tried to give Mother every supportive service they could to improve Mother's bond with her son, "but without any change to her ability to perceive it differently * * * it sort of appears there's not going to be much progress in that area."

{¶27} Hurry further testified that although Mother had completed her parenting courses, the evaluations showed that she made little progress; in Hurry's opinion, Mother complied with this caseplan objective, but she did not benefit from it. Hurry testified that the agency still had "concerns" with Mother's parenting skills and Mother had not demonstrated "appropriate parenting skills."

{¶28} Hurry testified that A.V. had been in the same foster home since he was two days old. The foster home was appropriate, with a stay-at-home foster mom and a foster father who made "ample" income to support a large family. The foster family had four adopted children and three other foster children residing in the house. A.V. had a strong bond with his foster mother and his foster family's oldest child. The foster family wanted to adopt A.V., who did not have special needs and was developmentally on track.

{¶29} Hurry opined that Mother had not benefitted from the services offered to her, had not remedied the conditions that led to the initial removal of her son, could not provide him a safe and permanent home, and believed that the child should not be returned to his biological mother.

{¶30} Bruce Chamberlin, a facilitator with Lakewood Family Collaborative, testified his job was to assist and support Mother and help her lay out "a roadmap to reunification." Chamberlin began to work with Mother in August 2012. He testified that Mother did not

follow through with services and was not receptive to his help. Instead, Mother asked Chamberlin to "refute" or "fight" the caseplan, but Chamberlin explained to her that he could not do so because the caseplan was in place to protect her son. He described Mother as "agitated physically with talk," who was "overfocused on her frustration," and refused to listen to his advice.

{¶31} Chamberlin testified that although Mother told him she was in a stable living arrangement at Drumm's house, he did not think the housing situation was appropriate for A.V. Chamberlin knew Drumm's family disapproved of Mother's living in the house, Robert Drumm had been ruled out as the biological father, and he had concerns about the senior Drumm's mental stability. Chamberlin testified that part of his role was to assist Mother with finding a job, but Mother was against seeking employment: "She felt that the government would offer assistance and she would not need to work outside the home." Mother refused the government programs Chamberlin recommended to her.

{¶32} Chamberlin worked with Mother for six months before he and his supervisor visited her in February 2013; Chamberlin felt as though they were "stuck" and not making any progress. Chamberlin urged Mother to "buy into" the agency's and Lakewood's programs to benefit her. At the meeting, Mother refused to work with Chamberlin, stating that she needed to talk to her lawyer.

{¶33} After the meeting at Drumm's house, Chamberlin did not see Mother again, but spoke to her by phone. He "begged" her to work her caseplan so she would not lose her child: "I remember being passionate about it. I remember saying you could lose your child. You have to do this." Chamberlin testified he "left the door open" for Mother to contact him and would have been happy to work with her toward reunification, but never heard back from her.

He waited the designated 30 days and closed her case, thinking it was a shame because Lakewood's program "could have really helped with the goal of reunification and stabilizing her life." Chamberlin testified that Lakewood's program had been very successful in helping families and he found it unusual that Mother walked away from the organization "because we are simply a tool in the toolbox to reach her goals." When Chamberlin closed the case in March or April of 2013, he did not support Mother being reunified with A.V. because he still had concerns with her housing and lack of parenting skills.

{¶34} Cynthia Holtzman, a counselor with Ohio Guidestone, became involved with Mother in March 2013 and worked with her for over four months, implementing a supportive visitation program to improve the quality of supervised visits. Mother was assigned a visits coach to assist her in managing "her negative feelings and navigate the visitation with A.V." Holtzman testified that while Mother showed improvement, visitations "never got consistently better" and at the end of the program, Holtzman did not think reunification was a good idea.

{¶35} Dr. Douglas Waltman testified that CCDCFS referred Mother for a psychological evaluation. He met with Mother for one hour and administered a personality test. Dr. Waltman testified that he was concerned with comments Mother made that indicated "an anti-medical bias" and he thought she could potentially medically neglect her child. Dr. Waltman gave a provisional diagnosis of schizotypal personality disorder, defined as a "pervasive pattern of social and interpersonal deficits marked by acute discomfort with a reduced capacity for close relationships, as well as by cognitive or perceptional distortions and eccentricities of behavior."

{¶36} Dr. Waltman testified that while he did not diagnose Mother with any significant mental health problems, he recommended she undergo psychiatric and forensic psychological

evaluations to assess whether she would benefit from psychiatric services and mental health counseling.

{¶37} Dr. Waltman testified that psychological evaluation reports are generally valid for 12 months, but because it had been over a year since Mother's evaluation, he would need to reevaluate her to opine as to her current mental health status. His evaluation and diagnosis, however, were valid at the time of the evaluation and when the agency filed for permanent custody.

{¶38} Thus, while two psychologists recommended that Mother receive a psychiatric evaluation, Mother refused to do so, and instead went and got a third psychological evaluation in preparation for trial. Hurry found out the morning of the permanent custody hearing that Mother had been recently evaluated by psychologist Dr. Sandra McPherson.

{¶39} In CCDCFS's January 2013 SAR, the agency reviewed the lack of progress Mother had made on her caseplan, finding:

> Mother has not cooperated with the efforts of the community collaborative worker to assist her in obtaining housing. [Mother] is residing with family members of the former alleged father, despite that this situation is less tha[n] suitable or conducive to reunification and despite that she has been presented with other housing options. Mother has been informed that [neither] the GAL[3] nor CCDCFS recommend this home for her, but has failed to make efforts to relocate.

{¶40} The SAR report also noted that Mother had "demonstrated little progress regarding her parenting skills," "objects to the care provided by the foster family," and "objected to many

[3]Guardian ad litem.

standard medical procedures both while admitted to the hospital and at follow-up visits, and has taken issue with the current pediatrician, which raises concerns if the child would receive routine or needed medical service if in her care." The report noted insufficient progress in the area of employment, non-cooperation with Lakewood's efforts to assist her in obtaining employment, and her refusal to attend employment counseling.

{¶41} CCDCFS concluded that Mother had not been amenable to services, did not feel that she needed the services being recommended in the caseplan, and had been confrontational during the staffing meetings, which limited her rate of her progress and her ability to benefit from the services.

{¶42} In February 2013, the trial court adopted the magistrate's recommendation and granted temporary custody of A.V. to the agency, finding, in part, that Mother refused the agency's attempts to offer services, had not visited with the child in two months, and lived in an unstable home.

{¶43} At the January 2014 SAR, the agency noted that it was able to contact another alleged father, the elderly man Mother was staying with when she gave birth, but test results reflected that he was not the biological father. The SAR report stated that Mother still had made insufficient progress under the employment component of the caseplan because she declined to attend employment counseling, failed to provide documentation that she registered with employment offices or applied for jobs, and did not pursue employment. The report indicated that Mother was evaluated by Dr. Painter, but the evaluation did not provide any diagnostic information and Mother had not completed a psychiatric evaluation or received treatment or counseling. As to the parenting component of the caseplan, the report indicated that Mother had made insufficient progress and her progress was "continually impacted by her

attitude and inability to control her emotions during visits." The report noted that Mother had become more argumentative and made inappropriate comments to A.V.

{¶44} The agency noted that Drumm was, at that time, in a nursing home and his children planned on selling his house and getting him an apartment, which would leave Mother homeless. Mother told the agency that the elder Drumm had provided for her in his will, but his children had submitted documentation to the agency showing that was not true. The report stated that Mother had refused to find alternative housing even though the agency, the GAL, and the magistrate had all found that Drumm's house was not suitable for A.V.

Mother's Case

{¶45} Dr. Sandra McPherson testified that she was a clinical and forensic psychologist who met with Mother twice in February 2014, reviewed the psychological assessment reports of Drs. Waltman and Painter, administered the MMPI-II, and reviewed other pertinent case materials. When evaluating Mother, Dr. McPherson took into account that English was not Mother's first language and Mother was not born in the United States. Based on her test results, Dr. McPherson found Mother's clinical profile to be within the normal limits and found no evidence of a diagnosable mental condition or personality disorder.

{¶46} Dr. McPherson explained that Mother's employment history did not concern her because Mother did what immigrants often did, take "low-level jobs," and do "menial kind of work," which "reflects that she was trying to get a job in bad times and she's an immigrant, and it's exactly the pattern we would expect."

{¶47} Dr. McPherson also explained that it is a pattern or a coping skill for "persons who are trying to make it in a new society" to trade their services for a place to stay, but admitted that Mother's current living situation was an "insecure environment" because it could deteriorate.

Dr. McPherson also did not think Mother had any bias toward medical care since Mother sought immediate medical care when A.V. was born and had sought medical care another time in Romania when she was sick.

{¶48} Dr. McPherson diagnosed Mother with "other conditions" and opined that she had enculturation problems, i.e., difficulties adjusting to a new culture, but that was not a mental illness or disorder. Dr. McPherson felt that Mother's previous diagnosis of schizotypal personality disorder was founded on her examiners' and caseworkers' "cultural naivety." When asked, Dr. McPherson opined that Mother had the "cognitive integrity" to parent, but admitted that she had not done a custody evaluation or observed Mother with A.V.

{¶49} Dr. McPherson also opined that reuniting A.V. with Mother, who had not parented him, would cause A.V. to "undergo a significant adjustment reaction," which would include depression and mourning for his foster parents. She stated that it would be "a substantial challenge in trying to parent him" and both Mother and child would need ongoing personal therapeutic counseling at least once a week. Mother would also need people she could rely on to assist her in being a single parent and professional advice for developing overall parenting and coping strategies.

{¶50} Cuyahoga County Public Defender's Office social worker Tunisia Currie testified that she had visited Drumm's house twice and completed a home study checklist. Currie found proper space, supplies, working appliances, and safety gates in the house and had no concerns or safety issues with Drumm's house. Mother told Currie she had a signed lease, but Currie had not seen the lease.

{¶51} Currie testified that her home study addressed whether the home was appropriate for the child, but the home study did not deal with the appropriateness of anyone living in the

home. Currie acknowledged that she had not met Drumm, and any knowledge she had that Drumm approved of Mother living in his house came from Mother herself.

Guardian ad Litem

{¶52} The GAL told the court that he had been on multiple visits to Drumm's house, the foster home, and had observed visitation between Mother and child. The GAL had concerns for Mother's mental health based on his own interactions with her and noted that she was unemployed and had no further plan for employment. The GAL had concerns about Mother's housing; he had spoken to to Drumm and three of his children about this. The GAL found Mother's living situation to be "somewhat hostile," with the Drumm family in "turmoil" over whether she should live there. Robert and Mother had a "fractured" relationship and Robert did not want her living in his father's house. He also noted that should something happen to the elder Drumm, Mother would no longer have a place to live.

{¶53} The GAL's paramount concern was bonding; the child had a significant bond with his foster family and it would be a substantial challenge for both Mother and A.V. if he were removed from his foster family. The GAL also noted that the agency's attempt to increase visitation from twice a month to every week did not go well "from the perspective of the child." The GAL recommended that it was in the child's best interests for permanent custody to be granted to CCDCFS.

{¶54} On April 11, 2014, the trial court granted CCDCFS' motion and committed the child to the permanent custody of the agency.

{¶55} Mother filed a timely notice of appeal, raising three assignments of error for our review.

II. Assignments of Error

> I. The Trial Court denied Appellant due process of law and her right to the effective assistance of counsel by failing to conduct an inquiry into Appellant's complaints regarding the inadequacy of the representation she was receiving.
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> II. Appellant was denied effective assistance of counsel where her court-appointed attorney failed to object to the admission of the report of Douglas Waltman, Ph.D, after Dr. Waltman had admitted: (i) that he merely performed a superficial screening of Appellant, (ii) that his report was "not meant to be a thorough psychological evaluation for purposes of deciding custody or fitness as a parent," and (iii) that his report "was no longer valid;" where appointed counsel failed to move to strike Dr. Waltman's testimony; and where Appellant's court-appointed counsel failed to obtain an independent child custody evaluation.
>
> III. The judgment of the Trial Court is against the manifest weight of the evidence.

III. Law and Analysis

Standard of Review

{¶56} An appellate court will not reverse a juvenile court's decision awarding permanent custody to an agency if the judgment is supported by clear and convincing evidence. *In re J.M-R.*, 8th Dist. Cuyahoga No. 98902, 2013-Ohio-1560, ¶ 26. Clear and convincing evidence is defined as:

> that measure or degree of proof which is more than a mere "preponderance of the evidence" but not to the extent of such certainty required "beyond a reasonable doubt" in criminal cases, and which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established.

In re Awkal, 95 Ohio App.3d 309, 642 N.E.2d 424 (8th Dist.1994), fn. 2, citing *Lansdowne v. Beacon Journal Publishing Co.*, 32 Ohio St.3d 176, 512 N.E.2d 979 (1987).

Permanent Custody Considerations

{¶57} The termination of parental rights is governed by R.C. 2151.414. *In re M.H.*, 8th Dist. Cuyahoga No. 80620, 2002-Ohio-2968, ¶ 22. R.C. 2151.414 requires the court to find, by clear and convincing evidence, that: (1) granting permanent custody of the child to the agency is in the best interest of the child under R.C. 2151.414(D), and (2) either the child (1) cannot be placed with either parent within a reasonable period of time or should not be placed with either parent if any one of the factors in R.C. 2151.414(E) are present (R.C. 2151.414(B)(1)(a)); (2) is abandoned (R.C. 2151.414(B)(1)(b); (3)) is orphaned and no relatives are able to take permanent custody of the child (R.C. 2151.414(B)(1)(c)); or (4) has been in the temporary custody of one or more public or private children services agencies for 12 or more months of a consecutive 22-month period (R.C. 2151.414(B)(1)(d)).

{¶58} Thus, in the event that R.C. 2151.414(B)(1)(a) applies, and the child cannot be placed with either parent within a reasonable time or should not be placed with the child's parents, a trial court must consider the factors outlined in R.C. 2151.414(E). *In re R.M.*, 8th Dist. Cuyahoga Nos. 98065 and 98066, 2012-Ohio-4290, ¶ 14; R.C. 2151.414(B)(2). The presence of only one R.C. 2151.414(E) factor will support the court's finding that the child cannot be reunified with the parent within a reasonable time. *Id.*

{¶59} In this case, the trial court found that A.V. had not been in agency custody for 12 or more months out of a 22-month period, but could not be placed with his mother within a reasonable time or should not be placed with his mother pursuant to R.C. 2151.414(B)(1)(a). The trial court then considered the R.C. 2151.414(E) factors. The R.C. 2151.414(E) factors the court found relevant to this case were:

> (1) Following the placement of the child outside the child's home and notwithstanding reasonable case planning and diligent efforts by the agency to assist the parents to remedy the problems that initially caused the child to be placed outside the home, the parent has failed continuously and repeatedly to substantially remedy the conditions causing the child to be placed outside the child's home. In determining whether the parents have substantially remedied those conditions, the court shall consider parental utilization of medical, psychiatric, psychological, and other social and rehabilitative services and material resources that were made available to the parents for the purpose of changing parental conduct to allow them to resume and maintain parental duties.
>
> (2) Chronic mental illness, chronic emotional illness, mental retardation, physical disability, or chemical dependency of the parent that is so severe that it makes the parent unable to provide an adequate permanent home for the child at the present time and, as anticipated, within one year after the court holds the hearing * * *.
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> * * *
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> (4) The parent has demonstrated a lack of commitment toward the child by failing to regularly support, visit, or communicate with the child when able to do so, or by other actions showing an unwillingness to provide an adequate permanent home for the child.
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> * * *
>
> (14) The parent for any reason is unwilling to provide food, clothing, shelter, and other basic necessities for the child or to prevent the child from suffering physical, emotional, or sexual abuse or physical, emotional, or mental neglect.

R.C. 2151.414(E)(1), (2), (4), (14).

{¶60} The trial court is also required, pursuant to R.C. 2151.414(B)(1), to make a finding that permanent custody is in the child's best interest by applying the factors set forth in R.C. 2151.414(D)(1)-(5). These factors include, but are not limited to: (1) the interaction and interrelationship of the child with the child's parents, siblings, relatives, foster parents, and out-of-home providers, and any other person who may significantly affect the child; (2) the wishes of the child as expressed directly by the child or through the child's guardian ad litem; (3) the custodial history of the child; (4) the child's need for a legally secure permanent placement

and whether that type of placement can be achieved without a grant of permanent custody to the agency; and (5) whether any factors in R.C. 2151.414(E)(7) through (11) are applicable. "There is not one element that is given greater weight than the others pursuant to the statute." *In re Schaefer*, 111 Ohio St.3d 498, 2006-Ohio-5513, 857 N.E.2d 532, ¶ 56. This court has stated that only one of the best-interest factors needs to be resolved in favor of the award of permanent custody. *In re Moore*, 8th Dist. Cuyahoga No. 76942, 2000 Ohio App. LEXIS 3958 (Aug. 31, 2000), citing *In re Shaeffer Children*, 85 Ohio App.3d 683, 621 N.E.2d 426 (3d Dist.1993).

Manifest Weight of the Evidence

{¶61} With these considerations in mind, we will first consider the third assignment of error, in which Mother argues that the trial court's decision to grant custody of A.V. to CCDCFS was against the manifest weight of the evidence.

{¶62} When conducting a manifest weight review, the reviewing court must weigh the evidence and all reasonable inferences, consider the credibility of witnesses, and determine whether in resolving conflicts in the evidence, the factfinder clearly lost its way and created such a manifest miscarriage of justice that the judgment must be reversed and a new trial ordered. *Eastley v. Volkman*, 132 Ohio St.3d 328, 2012-Ohio-2179, 972 N.E.2d 517, ¶ 20, citing *Tewarson v. Simon*, 141 Ohio App.3d 103, 750 N.E.2d 176 (9th Dist.2001).

{¶63} Although we consider credibility in a manifest weight review, we are mindful that the knowledge a trial court gains through observing the witnesses and the parties in a custody proceeding cannot be conveyed to a reviewing court by a printed record. *In re A.D.*, 8th Dist. Cuyahoga No. 85648, 2005-Ohio-5441, ¶ 6. Therefore, given the nature of the proceeding and

the impact the court's determination will have on the lives of the parties concerned, the discretion that a trial court has in custody matters should be afforded the utmost respect. *Id.*

{¶64} Mother argues that the agency relied upon proof that A.V. had been in agency custody for at least 12 months out of a 22-month period under R.C. 2151.414(B)(1)(d), but the trial court found that he had not been in custody for at least 12 out of 22 months; therefore, the judgment must be reversed. Mother is mistaken; the agency relied on R.C. 2151.414(B)(1)(a), and the court found pursuant to that subsection that A.V. had *not* been in agency custody for at least 12 months out of a 22-month period, but could not be placed with Mother within a reasonable period of time or should not be placed with her under R.C. 2151.414(B)(1)(a).

{¶65} The trial court also found, pursuant to R.C. 2151.414(E): (1) following the placement of the child outside the child's home and notwithstanding reasonable case planning and diligent efforts by the agency to assist the Mother to remedy the problems that initially caused the child to be placed outside the home, she continuously and repeatedly failed to substantially remedy the conditions causing A.V. to be placed outside the his home; (2) Mother had a chronic mental illness and chronic emotional illness that was so severe that it make her unable to provide an adequate permanent home at the time of the permanent custody hearing or within one year of the hearing; (3) Mother had demonstrated a lack of commitment to A.V. be failing to regularly support, visit, or communicate, and/or by her other actions has shown an unwillingness to provide an adequate permanent home for him; and (4) Mother was unwilling to provide stable housing, food, clothing, shelter or to prevent the child from suffering mental neglect as evidenced by her unwillingness to successfully complete her caseplan so she could provide care for him.

{¶66} With regard to the best interests factors under R.C. 2151.414(D)(1)-(5), the trial court considered the interaction and interrelationship of A.V. with his mother and foster parents, his custodial history, his need for a legally secure permanent placement, and the GAL's report.

{¶67} Mother next claims that the agency's entire case was constructed around the false idea that mother had a major mental illness and the court's finding that mother suffered from a mental or emotional illness was against the manifest weight of the evidence.

{¶68} Dr. Waltman diagnosed Mother with schizotypal personality disorder, but admitted at the permanent custody hearing that his initial provisional diagnosis was no longer valid due to the delay between the diagnosis and the hearing and he would have to reevaluate Mother in order to make a current diagnosis. Dr. McPherson, on the other hand, evaluated Mother two months before the permanent custody hearing. Dr. McPherson thought Mother might be having enculturation problems but found that she did not suffer from a mental illness or disorder. No mention was made by either doctor about any emotional illness.

{¶69} Based on our review of the record and the testimony presented at the permanent custody hearings, we disagree with the trial court's finding, under R.C. 2151.414(E)(2), that the evidence clearly and convincingly showed that Mother had a chronic mental illness and chronic emotional illness that was so severe that it made her unable to provide an adequate permanent home at the time of the permanent custody hearing or within one year of the hearing.

{¶70} Our analysis does not end here, however. Although Mother did not have an updated diagnosis from Dr. Waltman or another agency-approved doctor, it was because Mother did not follow through with the agency's recommendations in regard to her mental health; Mother refused to undergo a psychiatric and forensic evaluation and was therefore noncompliant with this portion of her caseplan. Instead, Mother sought out her own psychological evaluation

and when that doctor made the same or similar recommendations, Mother refused additional referrals or treatment. As to Dr. McPherson, the agency was unaware that Mother had been evaluated by the doctor until the day of the permanent custody hearing.

{¶71} Second, we disagree with Mother's contention that the agency's case was "entirely constructed" around the false notion that Mother had a mental illness. Hurry testified that the agency was concerned about Mother's mental health; therefore, addressing those concerns was made part of Mother's caseplan. Hurry referred Mother to Metrohealth for psychiatric services, but Mother claimed that Metrohealth did not offer those services. Regardless of Mother's noncompliance with this portion of the caseplan, the agency's case was not based solely on her mental health. As discussed, securing stable and suitable housing and employment, establishing paternity, and parenting education were also part of her caseplan.

{¶72} As previously stated, the presence of only one R.C. 2151.414(E) factor can support a trial court's finding that the child cannot be reunified with the parent within a reasonable time. In addition to the mental health finding, the trial court found that Mother failed continuously and repeatedly to substantially remedy the conditions that caused A.V. to be placed outside the home, her actions showed an unwillingness to provide an adequate permanent home for A.V., and her failure to successfully complete her caseplan made it so that she could not provide a stable home or care for her child. *See* R.C. 2151.414(E)(1), (4), and (14).

{¶73} Upon review, we find that the trial court's decision on these factors was supported by clear and convincing evidence. Importantly, in determining whether Mother had substantially remedied the conditions that caused A.V. to be placed outside his home, R.C. 2151.414(E)(1) directs the trial court to consider "parental utilization of medical, psychiatric, psychological, and other social and rehabilitative services and material resources that were made

available to the parents for the purpose of changing parental conduct to allow them to resume and maintain parental duties." Although the agency offered many services to mother, including a collaborative facilitator, supportive visitation, employment counseling, supplies, and numerous referrals, Mother refused to utilize those services and resources offered to her.

{¶74} Mother was noncompliant in securing stable housing. Mother's living arrangement, in many respects, may have been acceptable if she was living without a child and while it is not within the province of this court to opine on whether Drumm's house could have been a suitable home for A.V., it remains that the agency determined that his house was not a suitable or stable living environment. The GAL, Lakewood Collaborative, and the magistrate concurred with the agency's assessment. Even Mother's own witness, Dr. McPherson, found the Mother's living situation to be volatile.

{¶75} Mother continually refused to engage in those services that could have assisted her in finding suitable housing; instead Mother insisted on remaining at Drumm's house, to the detriment of her goal of reunification. Essentially, the agency never approved Drumm's house for A.V. and no matter what Mother did to try and make the house suitable (secure supplies for the baby, clean the house, procure a lease, have her own homestudy completed), she was unable to convince the agency the house was appropriate for A.V. Instead of complying with the caseplan and making attempts at securing alternative housing, Mother refused to leave. By doing so, she was unable to comply with her caseplan.

{¶76} The same can be said with the employment portion of her caseplan. The record reflects that Mother believed she should not work until A.V. was two, although A.V. was not in her custody, and the government would support her. Mother found two jobs, but quit them after a few months. Mother refused employment counseling, training, and referrals, and refused to

show documentation that she had been looking for jobs. Mother would not comply with agency requests for names of relatives that may financially or emotionally assist her with A.V. nor would she contact those government agencies that might be able to assist her.

{¶77} Finally, we consider the parenting portion of the caseplan. From the record, it is evident that Mother loves her child. Mother attended parenting classes, read numerous books on how to raise children, visited often with her child even though the visits were often difficult due to A.V.'s constant crying, and was assisted by a supportive visits coach. However, by all accounts, Mother was unable to benefit from her training and services. Mother and child were unable to establish a bond and the child was in distress during visitation. Although Mother worked to improve her parenting skills, she was unfortunately unable to acquire those skills necessary to parent her child.

{¶78} Next, we consider whether the agency having permanent custody of A.V. was in his best interest. The trial court found that, based upon the testimony and evidence presented and the GAL's recommendation, and after considering all relevant factors, including but not limited to R.C. 2151.414(D)(1)-(5), that it was in A.V.'s best interest to award permanent custody to CCDCFS.

{¶79} The testimony at the hearing established that A.V. was bonded with his foster family, especially with his foster mother and the foster family's oldest child. He was not able to bond with his mother and visits with her seemed to cause him great distress. Although the GAL indicated that A.V. was too young to express his wishes, the GAL told the court that when the agency increased the frequency of the visits from twice a month to every week, A.V.'s distress increased.

{¶80} A.V. has been in agency custody since he was two days old and with his foster family since that time. As a young child, A.V. is in need for a legally secure permanent placement, which could not be achieved without a grant of permanent custody to the agency. Mother had not identified other relatives willing to care for the child or putative fathers and had been unwilling to comply with her caseplan objectives.

{¶81} Finally, we consider Dr. McPherson's testimony, which the GAL relied on in making his oral recommendation to the court. Dr. McPherson testified that if A.V. was reunited with Mother, who had never parented him, he would undergo "a significant adjustment reaction," which would include depression and mourning for his foster parents. She testified that Mother would have "a substantial challenge in trying to parent him" and both Mother and child would need ongoing personal therapeutic counseling at least once a week. Mother would also need people she could rely on to assist her in being a single parent and professional advice for developing overall parenting and coping strategies. The record does not support that Mother would be successful in meeting these needs.

{¶82} In light of the above, we agree with the trial court that a grant of permanent custody to CCDCFS was in A.V.'s best interest.

{¶83} We recognize that "a parent's right to raise a child is an essential and basic civil right," *In re Hayes*, 79 Ohio St.3d 46, 48, 679 N.E.2d 680 (1997), and the "termination of the rights of a birth parent is an alternative of last resort." *In re Gill*, 8th Dist. Cuyahoga No. 79640, 2002-Ohio-3242, ¶ 21. The purpose of the termination of parental rights statutes is to make a more stable life for dependent children and to facilitate adoption to foster permanency for children. *See In re Howard*, 5th Dist. Tuscarawas No. 85 A10-077, 1986 Ohio App. LEXIS 7860, *5 (Aug. 1, 1986). This court does not look upon these matters lightly, and this case is

certainly no exception. But after thorough review of the record and with our standard of review, we find clear and convincing evidence supported the trial court's decision to grant permanent custody of A.V. to the agency and the decision was not against the manifest weight of the evidence.

{¶84} The third assignment of error is overruled.

Ineffective Assistance of Counsel

{¶85} In the first and second assignments of error, Mother argues that she was denied the right to effective assistance of counsel.

{¶86} To establish ineffective assistance of counsel, an appellant must demonstrate that his or her lawyer's performance fell below an objective standard of reasonable performance and that he or she was prejudiced by that deficient performance. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Brooks*, 25 Ohio St.3d 144, 495 N.E.2d 407 (1986). An appellant must show that, but for the lawyer's deficient performance, the outcome of the hearing would have been different. *Id.*

{¶87} An attorney is assumed to perform his or her duties ethically and competently. *State v. Lytle*, 48 Ohio St.2d 391, 396, 358 N.E.2d 623 (1976). In addition, a reviewing court will not second guess strategic decisions of trial counsel, at least insofar as they are reasonable. *Strickland* at 689; *State v. Hughbanks*, 1st Dist. Hamilton No. C-980595, 1999 Ohio App. LEXIS 5789 (Dec. 3, 1999).

{¶88} Mother first argues that the trial court erred in failing to consider her concerns with her first attorney's performance, which she raised in the objections to the magistrate's order granting temporary custody of A.V. to the agency. But the record reflects that the trial court considered Mother's objections and overruled them. Moreover, Mother made this claim in

objections she filed on February 22, 2013, and did not raise them again until her appeal, did not support her claim with more than the general accusation that she was "inadequately represented," and was given different counsel for the permanent custody hearings.

{¶89} Mother also contends that she was denied effective assistance of counsel because her trial counsel failed to object to the admission of Dr. Waltman's report. According to Mother, counsel should have moved to have his testimony and report stricken from the record because Dr. Waltman admitted he did a superficial assessment and his report was "no longer valid." But our review of his testimony and report do not show that they were improvidently admitted; the trial court, as trier of fact, was aware of the nature and date of the assessment and was able to give proper weight to his testimony and report. In other words, what Mother complains of concerns the weight of the evidence, not its admissibility.

{¶90} Mother argues that her counsel should have required Dr. McPherson to complete a custody evaluation in order to show that she could parent A.V. But this assumes that a custody evaluation would have reflected positively on Mother's ability to parent A.V. Such a determination was within counsel's discretion and we will not second-guess counsel's competency in this area.

{¶91} Mother also fails to show how she was prejudiced or how the outcome of the permanent custody hearing would have been different had trial counsel objected to Dr. Waltman's testimony and report and if Dr. McPherson had performed a custody evaluation. As previously discussed, there was substantial testimony by the state's witnesses that showed Mother's inability or unwillingness to find stable housing and employment, establish paternity, and benefit from parenting education. These caseplan objectives were independent from Mother's mental health and provided separate justification for the agency's determination that

Mother could not provide a permanent, stable home for A.V. Absent more, we cannot presume a custody evaluation would have caused the trial court to deny the agency's motion for permanent custody. Therefore, Mother has not shown how the result of the permanent custody hearing would have been different had counsel requested a custody evaluation or made the stated objections.

{¶92} The first and second assignments of error are overruled.

{¶93} Judgment affirmed.

It is ordered that appellees recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

LARRY A. JONES, SR., PRESIDING JUDGE

MARY EILEEN KILBANE, J., and
PATRICIA ANN BLACKMON, J., CONCUR